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HAROLD B. WILEY, C

Supreme Court of the United States

OCTOBER TERM, 1953

No. [redacted] 96

COMPAGNIE NATIONALE AIR FRANCE,

Petitioner,

against

EDITH KOMLOS, as Administratrix of the Goods, Chattels and Credits of EMERY KOMLOS, Deceased,

Plaintiff-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Compagnie Nationale Air France respectfully prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Second Circuit, filed and entered in the above entitled case on December 30, 1953.

Opinions Below

The opinion of the District Court (R. Vol. I, 52-82) is reported in 111 F. Supp. 393. The first opinion of the Court of Appeals (R. Vol. II, 194-199) is reported in 209 F. 2d 436 (adv. sheet); the second opinion, on the denial

of a petition for rehearing (R. Vol. II, 236) is as yet unreported.

Jurisdiction

The judgment of the Court of Appeals was entered on December 30, 1953 (R. Vol. II, 199); a petition for rehearing was timely filed on January 14, 1954 (R. Vol. II, 201); the opinion denying a rehearing was filed on February 26, 1954 (R. Vol. II, 236). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Questions Presented

Whether the statutory assignment, under New York Workmen's Compensation Law, Section 29, of a single cause of action for wrongful death, which arose in the Azores, Portugal, embraced all elements of damage flowing therefrom, including indemnity ("moral damages") for psychic suffering which the death caused to the assignor (R. Vol. II, 196, fol. 197), which "moral damages" may be recoverable under the Portuguese law but which would not be recoverable if the New York death statute applied.

Whether the Warsaw Convention (49 U. S. Stat. at Large, 3000 et seq.) creates a cause of action for wrongful death.

Whether the Warsaw Convention (49 U. S. Stat. at Large, 3000 et seq.), under the conflicts of law doctrine prevailing in the State of New York, supplants the lex loci delicti and, therefore, the foreign (Portuguese) law does not apply.

Statutes Involved

The pertinent statutory provision (New York Workmen's Compensation Law, Section 29) and Article 17 of the Warsaw Convention are printed in Appendix A, *infra*, pp. 15-17.

Statement

The deceased, at death, was an American citizen, a New York resident, and an employee of a New York corporation having its principal place of business in New York. He was traveling on his employer's business, whose employees were covered by the employer's workmen's compensation policy, issued by Royal Indemnity Company (herein called "Royal"), pursuant to the New York Workmen's Compensation Law. (R. Vol. I, 15, 52; Vol. II, 16, 47.)

The deceased was a passenger on an Air France plane which crashed on October 28, 1949, in the Azores, Portugal (R. Vol. I, 52). The carriage was subject to the Warsaw Convention. (R. Vol. I, 17-22, 57; Vol. II, 43-46.)

The deceased, an unmarried adult, left as his only survivors his mother, Bertha, and an adult sister, Edith (R. Vol. I, 7, 52, 75; Vol. II, 31). The mother filed a claim for compensation (R. Vol. I, 15, 52; Vol. II, 19, 48). The Workmen's Compensation Board made an award to the mother which was entered and filed on March 6, 1950. Royal made payments thereunder. (R. Vol. I, 52-53, 78-79; Vol. II, 10-11, 19, 28-42, 48.)

On October 26, 1950, more than six months after the said award of compensation, the Estate commenced this action. An amended complaint (herein called "complaint") (R. Vol. I, 6, 53; Vol. II, 4, 14, 48) was filed.

On October 3, 1951, Royal, as statutory assignee, instituted a separate action against Air France, in the same District Court, on the same cause of action. (R. Vol. I, 52; Vol. II, 4, 14, 15-22, 49.)

The complaint demands $150,000 for the alleged wrongful death, $550 for funeral expenses, and $1,500 for baggage and personal belongings (R. Vol. I, 6-11, 54-55). Six causes of action are set up in the complaint, being varia-

tions of allegations of (a) negligence and (b) wilful misconduct under general law, Portuguese law, and the law applicable in the Azores. The answer (R. Vol. I, 12-29) denies most of the material allegations of the complaint and alleges various special defenses, including that Royal is the statutory assignee of the claim and defenses under the Warsaw Convention.

Air France moved for summary judgment against the Estate because it was not the real party in interest, except as to the $1,500 baggage claim (R. Vol. II, 1, 14). Simultaneously therewith, Air France moved to dismiss the Royal complaint, if the Estate was held to be the real party in interest. (R. Vol. 11, 23, 27.)

The District Court granted summary judgment dismissing the Estate complaint, except as to the $1,500 baggage claim which was ordered severed and remanded to the State Court from which it was removed. The District Court granted the motion against Royal to the extent of dismissing the $1,500 baggage claim. (R. Vol. I, 82, 83-85; Vol. II, 192-193.)

In part, the District Court held: the right of action for wrongful death was created by the law of Portugal, not the Warsaw Convention (R. Vol. I, 62-63); under New York and Portuguese laws, the mother is the sole dependent, the sole next of kin, and the only one to receive the benefits, if any, of the death action (R. Vol. I, 68-76); there was no splitting of the cause of action which passed to Royal, the statutory assignee. (R. Vol. I, 76.)

The Court of Appeals reversed the District Court, holding in part as follows: The lex loci applies, there is a "single indivisible cause of action" for the death with two items of damage, the mother has the sole beneficial interest in any recovery, and there is a right to "moral damages" under Portuguese law in aviation death actions (R. Vol. II, 196). The statutory assignment operated, except as to the element of "moral damages" because in death actions,

"* * * moral damages is not recoverable in New York or elsewhere in this country, * * * it was not in the contemplation of the legislature and therefore does not pass under § 29(2)." (R. Vol. II, 197.) The Court of Appeals concluded that to allow Royal to maintain its action would be a splitting of the cause of action for death, therefore prosecution of the entire action would remain in the hands of the Estate (R. Vol. II, 197-198). On the rehearing, the Court of Appeals said it did not intend to finally decide whether Portuguese law permitted recovery of "moral damages" in aviation death actions, and left the issue to be decided by the trial court (R. Vol. II, 236).

Specification of Errors to Be Urged

The Court of Appeals erred:

(1) In holding that an element of damage ("moral damages"), which may be allowed under Portuguese law, did not pass to Royal under the statutory assignment (New York Workmen's Compensation Law, § 29) of the "cause of action" for wrongful death.

(2) In failing to hold that the statutory assignment of the "cause of action" for wrongful death embraces all elements of damage included therein, whether or not certain of such elements ("moral damages") are recognized in actions for wrongful death arising under the law of the forum (New York).

(3) In holding that the lex loci (Portugal) applies to an action for wrongful death brought in the State of New York, when the Warsaw Convention is applicable.

(4) In failing to hold that under New York law, the Warsaw Convention, in actions arising thereunder, is its

own law, self-executing and supersedes the lex loci as to the right and measure of recovery.

(5) In reversing the order and judgment of the District Court.

Reasons for Granting the Writ

1. The holding that "moral damages"—"indemnity * * * for psychic suffering"—does not pass under the assignment section of New York Workmen's Compensation Law (§ 29) because unknown to New York law and, therefore, not within the contemplation of the New York legislature, is erroneous.

Indemnity for "moral damages" is and was known to New York law:—

a. In non-death actions recovery is permitted for pain and suffering. This element of damage has been held to pass under the said assignment statute (*Lumbermen's Cas. Ins. Co.* v. *William Spencer & Sons,* 41 N. Y. Supp. 2d 319) as the Court of Appeals (R. Vol. II, 197) pointed out.

b. It was and is known through the New York conflicts of law doctrine under which the lex loci delicti is enforced in proper cases, and through the development of the New York death statutes. The original death act (Lord Campbell's Act, 1846) was strictly construed by the English courts to eliminate "evaluating the impalpable injuries to sentiments and affections because of death" (Prosser on Torts, 963; *Blake* v. *Midland Ry.* [1852], 18 Q. B. 93, 118 Eng. Rep. 42) and many American states, including New York, followed this strict construction and restricted their death acts to recovery for pecuniary loss. So that when the New York legislature enacted its death statute, years before the passage of the Workmen's Compensation Law, it must have considered this factor if only for the purpose of avoiding the concept in its own legislation on death

actions. In death actions arising in a number of American states, this type of damage ("moral damages") is recoverable * and the New York courts would enforce the law of those states in proper instances.

Clearly, indemnity for psychic suffering ("moral damages") is and was known to New York law, but in actions arising under the New York death act, recovery therefor is not permitted.

Arguendo, if this element of damages is considered "unknown" to New York law, it must still be governed by the assignment statute (§ 29). The Workmen's Compensation Law is general and comprehensive in its terms and prospective in operation. As has been held:

> "* * * legislative enactments in general and comprehensive terms, and prospective in operation, apply to persons, subjects and businesses within their general purview and scope though coming into existence after their passage, where the language fairly includes them * * *." (*Cain* v. *Bowlby*, 114 F. 2d 519, 522, cert. den. 311 U. S. 710.)

The New York legislature has shown its intention to make the Workmen's Compensation Law general, comprehensive and prospective in operation and its knowledge that rights "unknown" to New York law were meant and intended to pass under the assignment statute. Various Empire State Building employees received awards under the New York Workmen's Compensation Law after being injured when an Army bomber struck the building in July, 1945. No right of action existed against the United States because of sovereign immunity (*Comm'rs, etc.* v. *U. S.*, 72 F. Supp. 549, 554). On August 2, 1946, the Federal Tort Claims Act became effective retroactive to January 1, 1945. In 1947 the Workmen's Compensation Law, § 29, was amended—the Commission's note on the amendment states (and the Draftsman's notes are to the same effect):

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* Among others, Louisiana, South Carolina, Virginia, West Virginia, Florida (grief, bereavement, anxiety, distress, mental pain, etc.). Alabama, Kentucky, South Carolina, and others allow exemplary damages; New York does not.

> "The purpose of the amendment is to afford an injured employee, or in case of death, his dependents, a reasonable opportunity after the passage or enactment of a law or laws, state, federal or municipal, which affords or creates a *new* or additional remedy, or a new or additional enforceable claim, a reasonable opportunity after the passage or enactment of said law to legally assert or take steps to enforce his rights, *which otherwise might be assigned to the person liable for the payment of compensation.*" [Emphasis ours.] (64 McKinney's Consol. L. of N. Y., Part II, 1953 Supp., pp. 51-52 thereof under § 29.)

The legislature directed that the failure of an employee to bring his action "shall operate as an assignment of the cause of action * * *." The legislature used the broadest possible description of the rights to be so assigned (i.e., "the cause of action") and the New York courts have so applied it.

> "They [a dependent widow and children] retain no interest whatever in their cause of action. They assign it as a whole. There is no hint of any remaining right, either legal or equitable, surviving against the carrier * * *. * * *. Ordinarily the assignee of a cause of action recovers in the right of his assignor and to the extent that the assignor might himself recover. How much the assignee * * * paid * * * is immaterial. The general rule * * * confining damages to compensation applies to the party originally injured, not to his assignee. There is no reason that the same rule should not apply to the assignment of a cause of action for personal injuries were the same allowed. In this one case the assignment of such a cause of action is expressly authorized * * *." (*Travelers Ins. Co.* v. *Brass Goods Mfg. Co.*, 239 N. Y. 273, 276-7.)
>
> "* * *. 'The cause of action' was assigned by operation of the law upon the making of the award, not a part of it, but the whole of it. Plaintiff is entitled to recover, * * * to the same extent and subject to the same rules as if Kochmin [the employee] himself were the plaintiff. * * * unlimited and unaffected by the award * * *." (*Royal Indemnity* v. *J. G. White Engineering Corp.*, 120 Misc. 322, 198 N. Y. S. 264, 270.)

"* * *. The legislature intended that the full and complete cause of action should pass under the assignment. * * *." (*Skakandy* v. *State*, 66 N. Y. Supp. 2d 99, 113.)

2. The Court of Appeals failed to hold that the Warsaw Convention is its own law, self-executing and superseding the lex loci as to the right and measure of recovery. The New York rule on conflicts of law governs (*Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487, 496). The New York decisions hold that the Warsaw Convention is self-executing and does supersede the lex loci (*Garcia et al.* v. *Pan-American Airways*, 269 App. Div. 287, 292, aff'd 295 N. Y. 852, cert. den. 329 U. S. 741; *Ross* v. *Pan American Airways*, 299 N. Y. 88; *Salamon* v. *K.L.M.*, 107 N. Y. Supp. 2d 768, aff'd 281 App. Div. 965, 120 N. Y. Supp. 2d 917).

3. The questions presented are of importance in the administration of (a) the Workmen's Compensation Laws and (b) the Warsaw Convention.

(a) The Workmen's Compensation Laws, in New York, and generally, are liberally construed, general and comprehensive in terms and prospective in operation. Certainly when the New York legislature enacted the law it meant to deal comprehensively with the subject and in so doing to exercise all the power which it possessed (*Puerto Rico* v. *Shell Co.*, 302 U. S. 253, 258-9). Also, it is settled law in New York, and in many other states, that the Workmen's Compensation Law is extraterritorial in effect (*G. Bradford Elec. Light Co.* v. *Clapper*, 286 U. S. 145; *Matter of Post* v. *Burger & Gohlke*, 216 N. Y. 544; *Matter of Klein* v. *Stoller & Cook Co.*, 220 N. Y. 670; *Matter of Fitzpatrick* v. *Blackall & Baldwin*, 220 N. Y. 671; *Matter of Smith* v. *Aerovane Utility Corp.*, 259 N. Y. 126; *Matter of Alexander* v. *Movietonews, Inc.*, 273 N. Y. 511, 599; *Spelar* v. *American Overseas*, 80 F. Supp. 344.

As a result of the decision and judgment of the Court of Appeals, the established workmen's compensation systems will be upset or distorted in the following ways:

The laws will be narrowly construed to apply only to rights (and by extension, to persons, subjects, things and businesses) known to the legislature at the time of their enactment.

There will be a mad scramble by injured employees or their representatives to discover or try to develop some theory under the lex loci delicti, unknown to the enacting state's legislature at the time of enactment of the workmen's compensation law, in order to circumvent the established statutory assignment or election procedures. The precise question here involved (i.e., "moral damages") could arise in deaths occurring in a number of foreign countries or in any of the states which allow such damage in death actions.

By simple extension it will destroy a basic principle of workmen's compensation, i.e., that workmen's compensation is in lieu of any liability by the employer to the employee, and allow the employee or his representative, to take compensation and still sue the employer under some theory recognized by the lex loci delicti which is or was unknown to the legislature of the enacting state because, if the "unknown" right is not covered by the assignment statute, since, as held by the Court of Appeals, the legislature did not contemplate it, it is also not covered by that part of the workmen's compensation law which protects the employer from claims by the employee or his representative. This will impose additional liability on the employer not covered by the workmen's compensation systems.

Statutory assignments in the most general terms (i.e., of "the cause of action") will be restricted by judicial interpretation when the clear intent of the leg-

islature (and New York courts have so interpreted it) was to assign the entire cause of action as fully as the owner thereof could do if the law permitted.

It will upset the calculations and rate systems of the various insurance carriers who will now be faced with assignments destroyed by split causes of action.

(b) The Warsaw Convention (49 U. S. Stat. at Large, 3000 et seq.) governs practically all international travel by air. There are decisions by the New York appellate courts clearly showing that the Convention is self-executing and supersedes the lex loci delicti (*Ross* v. *Pan American,* 299 N. Y. 88; *Garcia et al.* v. *Pan American,* 269 App. Div. 287, 292, aff'd 295 N. Y. 852, cert. den. 329 U. S. 741; *Salamon* v. *K. L. M.,* 107 N. Y. Supp. 2d 768, aff'd 281 App. Div. 965, 120 N. Y. Supp. 2d 917). One New York Supreme Court decision holds that the Warsaw Convention does not create any new substantive rights (*Wyman* v. *Pan American,* 181 Misc. 963, aff'd no op. 267 App. Div. 947, 293 N. Y. 878, cert. den. 324 U. S. 882).

The District Court held that if the lex loci delicti created a right of action for wrongful death, that law, not the Convention, was the source of the right; but if the lex loci delicti did not create such a right, the Warsaw Convention would then be considered as creating an enforceable right therefor (R. Vol. I, 65-66). The Court of Appeals, by clear inference (R. Vol. II, 196) concurred that the lex loci delicti created the right.

Whether the Warsaw Convention creates its own rights of action in tort liability claims is a question that rides in every international flight into or out of the United States. A clear unequivocal ruling as to whether or not the Convention is self-executing (i.e., creates its own rights of action) would be of enormous value to the courts, litigants and their counsel. It would determine whether or not proof of foreign law is required—and if it is not, trials

and their preparation, under the Warsaw Convention, would be greatly simplified and facilitated (in the instant case, proof of Portuguese law, and the questions raised concerning "moral damages" would be obviated).

Settlement of these questions is plainly in the public interest. The workmen's compensation law question can arise in almost any claim for compensation made in one state where the locus delicti is in another state or country. The Warsaw Convention question will be present in every claim or action properly brought in the courts of this country for damage, loss, injury or death, occurring in a foreign country in international air transportation under the Convention.

3. The decision of the Court of Appeals is believed to be erroneous and in conflict with the general rules of construction of statutory systems which are general and comprehensive in terms and prospective in operation (i.e., workmen's compensation laws) . Further, the decision below is probably in conflict with the intention of the New York legislature, the decisions of the New York courts (as to what the statutory assignment of "the cause of action" covers), and the decisions of this Court on statutory construction (see *Lynch* v. *Alworth-Stephens,* 267 U. S. 365, 369-371 [a tax question]; *Barr* v. *United States* 324 U. S. 83, 90 [Tariff Act]). If the fundamental change in the Workmen's Compensation Law suggested by the Court of Appeals is deemed necessary, on whatever ground, such change rests not with the courts but with the legislature, which in this instance has not made any such change, but actually has indicated its contrary intention and understanding.

The decision of the Court of Appeals is also believed to be erroneous in failing to apply the Warsaw Convention in accordance with the conflicts of law doctrine prevailing in New York State courts applicable to the Convention (*Klaxon Co.* v. *Stentor Co.,* 313 U. S. 487; *Ross* v. *Pan-*

American, 299 N. Y. 88; *Garcia et al.* v. *Pan American,* 269 App. Div. 287, 292, aff'd 295 N. Y. 852, cert. den. 329 U. S. 741; *Salamon* v. *K. L. M.,* 107 N. Y. Supp. 2d 768, aff'd 281 App. Div. 965, 120 N. Y. Supp. 2d 917) thereby causing, in this case as it will in others, much uncertainty and great expense.

CONCLUSION

Wherefore, for the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Statutes

New York Workmen's Compensation Law—Sec. 29
(64 McKinney's Consol. Laws of New York)

Remedies of employees; subrogation

1. If an employee entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in the case of death, his dependents * * * may take such compensation and medical benefits and at any time either prior thereto or within six months after the awarding of compensation or within nine months after the enactment of a law or laws creating, establishing or affording a new or additional remedy or remedies, pursue his remedy against such other subject to the provisions of this chapter. If such injured employee, or in case of death, his dependents, take or intend to take compensation, and medical benefits in the case of an employee, under this chapter and desire to bring action against such other, such action must be commenced not later than six months after the awarding of compensation or not later than nine months after the enactment of such law or laws creating, establishing or affording a new or additional remedy or remedies and in any event before the expiration of one year from the date such action accrues. * * *.

2. If such injured employee, or in case of death, his dependents, has taken compensation under this chapter but has failed to commence action against such other within the time limited therefor by subdivision one, such failure shall operate as an assignment of the cause of action against such other to the state for the benefit of the state insurance fund, if compensation be payable therefrom, and otherwise to the person, association, corporation, or insurance carrier liable for the payment of such compensation. Ex-

cept as hereinafter provided,[a] the failure of the injured employee or his dependents to commence an action pursuant to the provisions of subdivision one of this section, shall not operate as an assignment of the cause of action as provided herein, unless the insurance carrier shall have notified the claimant in writing by personal service or by registered mail at least thirty days prior to the expiration of the time limited for the commencement of an action by subdivision one, that such failure to commence such action shall operate as an assignment of whatever cause of action may exist to such insurance carrier. If the insurance[a] carrier shall fail to give such notice, the time limited for the commencement of an action by subdivision one shall be extended until thirty days after the insurance carrier shall have notified the claimant in writing that failure to commence an action within thirty days after the mailing of such notice shall operate as an assignment of the cause of action to such carrier, and in the event the claimant fails to commence such action within thirty days after the mailing of such notice, such failure shall operate as an assign-

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[a] Subd. 2 was amended by L. 1951, c. 527, eff. Sept. 1, 1951 inserting the two sentences beginning with the words "Except as hereinafter provided" and "If the insurance". This amendment took effect almost 18 months after the compensation award was made to the mother. The District Court held the assignment was complete before the effective date of the amendment which was not retroactive (R. Vol. I, 81-82) and the Court of Appeals by clear inference agreed (R. Vol. II, 197). The weight of the lower court decisions in New York support the conclusion that the amendment is not retroactive and does not effect assignments which were complete before September 1, 1951; the Appellate Division of the New York Supreme Court has now settled the question, stating in part as follows:

> "* * *. The amendment was not intended to divest the carrier of the ownership * * *. Even if the amendment were a procedural statute, it could not 'reach backward, and nullify by relation the things already done' * * *, i.e. it could not reassign to plaintiff the cause of action which had already been assigned by operation of law to the insurance carrier on August 19, 1951. The statute, effective September 1, 1951, did not create a new or additional remedy. * * *."
>
> (*Olker, resp. v. Salomone et al., app.* ..... App. Div. ....., New York Law Journal, May 4, 1954, page 9.)

ment of such cause of action to such carrier. If such * * * carrier, as such an assignee, recover from such other, either by judgment, settlement or otherwise, a sum in excess of the total amount of compensation awarded to such injured employee or his dependents and the expenses for medical treatment paid by it, together with the reasonable and necessary expenditures incurred in effecting such recovery, it shall forthwith pay to such injured employee or his dependents, as the case may be, two-thirds of such excess, and to the extent of two-thirds of any such excess such recovery shall be deemed for the benefit of such employee or his dependents * * *.

3.-6. * * *.[b]

WARSAW CONVENTION

(Convention for the Unification of Certain Rules Relating to International Transportation by Air)
49 U. S. Stat. at Large, 3000 et seq.

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

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[b] Subd. 6 of § 29 provides that the right to compensation shall be the exclusive remedy to the employee, or his dependents, where injury or death is caused by the negligence or wrong of another in the same employ.

§ 11 of the Workmen's Compensation Law provides that the liability of the employer under the Workmen's Compensation Law "shall be exclusive and in place of any other liability whatsoever, to such employee, his personal representatives, husband, parents, dependants or next of kin, or anyone otherwise entitled to recover damages, at common law or otherwise on account of such injury or death * * *" unless the employer does not comply with the Workmen's Compensation Law.

No. 96 CORRECTED COPY p. 197

[fol. 194] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1953

No. 59

(Argued November 13, 1953, Decided December 30, 1953)

Docket No. 22751

EDITH KOMLOS, as Administratrix of the Goods, Chattels and Credits of EMERY KOMLOS, Deceased, Plaintiff-Appellant,

v.

COMPAGNIE NATIONALE AIR FRANCE, Defendant-Appellee

Before: Swan, Frank and Medina, Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Judge Leibell presiding. Reversed.

Frederick W. Scholem (Theodore E. Wolcott, of Counsel), for plaintiff-appellant. Sutta & Frankel, Esqs., for Royal Indemnity Co. Foley and Statt (Frank J. Foley and Milton James, of counsel), for defendant-appellee.

[fol. 195] On October 28, 1949, Emery Komlos, a passenger on an airplane operated by defendant Air France, lost his life when the plane crashed on the island of San Miguel, Azores, Republic of Portugal. Komlos, an American citizen, and a resident of New York, was in the employ, in the State of New York, of the Refugee Economic Corporation, and engaged in the work of the corporation at the time of his death. Royal Indemnity Company had issued a workman's compensation policy which covered Komlos and other employees of the Refugee Economic Corporation under the Workmen's Compensation Law of New York. Thirty-two years old and unmarried, Komlos left surviving him his mother, Bertha Komlos, and a sister, Edith Komlos. The mother made a claim for compensation before the Workmen's Compensation Board and received notice of a compensation award on March 6, 1950. The sister of the deceased

obtained letters of administration on the estate of Emery Komlos, issued by the Surrogate's Court of New York County. On October 26, 1950, as administratrix, she began an action in Supreme Court, New York County, on behalf of Bertha Komlos, Edith Komlos and the Komlos Estate against defendant Air France, which removed the case to the federal court below on the grounds of diversity of citizenship. The amended complaint claims $150,000 as the loss of the next of kin for the wrongful death of Emery Komlos, $550 for burial expenses, and $1500 for the loss of decedent's baggage and personal belongings. It also claims that, under the law of Portugal, decedent's next of kin and dependents are entitled to "moral damages" for the negligence of the defendant in causing Komlos' death.

Defendant Air France, in its answer, alleged that the entire "cause of action" for wrongful death alleged in the Komlos complaint belongs to the Royal Indemnity Company under the assignment provision of § 29(2) of the New [fol. 196] York Workmen's Compensation Law. Under § 29(2), where a dependent of the deceased elects to receive compensation and does not sue the third-party tort-feasor within six months after the award of compensation, the dependent's cause of action against the third-party tort-feasor is automatically assigned to the compensation carrier. The six months expired on September 6, 1950. The present action was brought almost two months after the expiration of the six-months' period. Royal Indemnity Company began an action against Air France on October 3, 1951 for the wrongful death of Emery Komlos. Plaintiff moved for consolidation of the Komlos and Royal Indemnity actions. The court below denied the motion. Defendant moved for a dismissal of the Komlos complaint on the ground that the cause of action belonged to Royal Indemnity Company. The motion was granted and that part of the complaint alleging a cause of action for wrongful death was dismissed. The cause of action for destruction of the baggage was remanded to the Supreme Court of New York County on the grounds that it alone would not support federal jurisdiction for lack of the requisite amount. The opinion below is reported at 111 F. Supp. 393.

Frank, Circuit Judge:

1. For the death of Emery Komlos there is a single indivisible cause of action with two items of damage. Since the accident resulting in Komlos' death occurred within a province of Pŏrtugal, the Portugal law (the *lex loci delicti*) applies. Under it, the dependent of the deceased is entitled, upon proof of defendant's negligence, to damages for wrongful death and indemnity ("moral damages") for [fol. 197] the psychic suffering which the death caused to her.[1] Judge Leibell found,[2] and we think properly so, that, under the Portugal law as submitted to him and under the law of New York,[3] Bertha Komlos, the mother of the deceased, has the sole beneficial interest in any recovery for the wrongful death of Emery Komlos, since she was the deceased's sole dependent and his only next of kin as defined by the New York statute. As Administratrix of her brother's estate, Edith Komlos has standing, as a nominal plaintiff, to sue for her mother.[4] The right of the administratrix to bring the action is recognized by the law of Portugal.[5]

Defendant argues that Royal Indemnity Company, the insurance carrier, is the statutory assignee of the cause of

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[1] A federal court, sitting in New York State, must apply the conflict-of-laws doctrine prevailing in New York State courts. *Klaxon* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487, 496. According to New York law, the creation and extent of tort liability is governed by the law of the place where the alleged tort was committed. *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, 120 N. E. 198. The measure of damages is likewise determined by the *lex loci delicti*. *Hasbrouck* v. *New York Central Railroad Co.*, 202 N. Y. 363, 95 N. E. 808.

[2] 111 F. Supp. 393 at 407.

[3] Decedent's Estate Law § 133.

[4] "Unless the statute [of the lex loci delicti] limits suit to named beneficiaries, or a particular administrator or personal representative, an administrator appointed at the forum may institute the action. Goodrich, Conflict of Laws, § 104, p. 301. *Leonard* v. *Columbia Steam Navigation Co.*, 84 N. Y. 48.

[5] 111 F. Supp. 393 at 403.

action for the wrongful death of Komlos because the deceased's sole dependent, his mother, elected to receive compensation and failed to sue the third-party tortfeasor (Air France) within six months after the compensation award. On the face of it, were the action here a simple action for wrongful death claiming damages for negligence alone, this contention would seem to be correct. Section 29(2) [fol. 198] of the New York Workmen's Compensation Law provides for an automatic statutory assignment of all claims belonging to the injured employee or, in case of his death, to his surviving dependents if they elect to take compensation and fails to commence suit against the third-party tortfeasor within six months after the compensation award.

However, this is not such a case of a simple claim for damages for negligence. While that part of the cause of action demanding indemnity for defendant's negligence in causing a wrongful death is assigned by § 29(2), we think the demand for "moral damages" is not and was never meant to be. True, it has been held that a claim for the pain and suffering of the injured person is part of the claim which passes under § 29(2).[6] We have no doubt, therefore, that were "moral damages" not unknown to New York law, they would similarly pass. But, since a claim for moral damages is not recoverable in New York or elsewhere in this country, we think it was not in the contemplation of the legislature and therefore does not pass under § 29(2). Consequently, to allow the insurance carrier, Royal Indemnity, to sue on its assigned claim, would be to permit a splitting of the cause of action for Komlos' death. We think it clear that the policy of § 29(2) is to prevent such splitting,[7] and that, accordingly, to allow Royal to sue for the one assignable item of damage would be in violation of that policy.

The question therefore becomes one of who shall retain

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[6] *Lumberman's Cas. Ins. Co.* v. *William Spencer & Sons*, 41 N. Y. S. (2d) 319.

[7] The New York courts have often stated that the function of § 29(2) is to prevent the splitting of causes of action. See, e.g., *Skakandy* v. *State*, 66 N. Y. S. (2d) 99, aff'd App. Div. 80 N. Y. S. (2d) 849 (1948).

the right to sue on the entire cause of action, the estate [fol. 199] for the benefit of Mrs. Komlos or the carrier. We think the cogent reasoning in *Doleman* v. *Levine*, 295 U. S. 221, should control here. In that case, some dependents of the deceased, elected to receive compensation under the federal Harbor Workers Act, while other dependents elected to sue the third-party tortfeasor.[8] The Court held that the insurance carrier (in that case, the employer) received only a partial assignment, that is, was subrogated to the rights of only those dependents who elected to receive compensation; having only a partial assignment, the carrier could not cause a splitting of the cause of action, for the employee's death, by bringing its own suit on its assignment. The New York Court of Appeals reached a similar conclusion as to the New York Workmen's Compensation statute, in *U. S. Fidelity & Guaranty Co.* v. *Graham & Norton*, 254 N. Y. 50, 171 N. E. 903. Both the United States Supreme Court and the New York Court of Appeals remitted the carrier, the holder of a partial assignment, to the remedy of compelling the compensated dependents to sue the tortfeasor, and thus to reimburse itself out of the proceeds of their action. We think the salutary doctrine against splitting causes of action[9] should be applied here. If Royal Indemnity Company could sue on its assignment, not only would there result such a splitting but also the "moral damages" item would evaporate. To avoid violation of the policy of the statute, we hold that the entire

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[8] The Harbor Workers Act, 33 U. S. C. § 901 *et seq.* compels an election between compensation and the right to bring suit against the third-party tortfeasor. Unlike the present New York Compensation Statute § 29(2), the Harbor Workers Act specifies that dependents cannot both receive compensation and bring suit. Nevertheless, for the purposes of the present case, the *Doleman* case is closely in point, since, in both cases, the election to receive compensation could, at best, result in but a partial assignment to the compensation carrier.

[9] *Indemnity Ins. Co. of North America* v. *Pan-American Airways*, 57 F. Supp. 980.

[fol. 200] cause of action remains in the hands of Komlos' estate for the benefit of the mother.

2. The district court remanded to the state court the $1500 claim for loss of baggage and personal belongings, because, having dismissed the wrongful-death action, the court could not retain the remaining claim, the requisite jurisdictional amount being absent. Since this appeal has resulted in the reinstatement of the Komlos wrongful-death action, there is a jurisdictional basis for the retention of the baggage claim and that claim should remain in the federal court and be tried with the wrongful-death action.[10]

Reversed.

[fol. 201] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 30th day of December one thousand nine hundred and fifty-three.

Present: Hon. Thomas W. Swan, Hon. Jerome N. Frank, Hon. Harold R. Medina, Circuit Judges.

EDITH KOMLOS, Admnx., etc., Plaintiff-Appellant,

v.

COMPAGNIE NATIONALE AIR FRANCE, Defendant-Appellee

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order and judgment of said District Court be and they hereby are reversed with costs and cause remanded in accordance with the opinion of this Court.

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[10] See 28 U. S. C. § 1441(c).

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

(S.) Alexander M. Bell, Clerk, by A. Daniel Fusaro, Deputy Clerk.

[fol. 202] [Endorsed:] United States Court of Appeals for the Second Circuit. Edith Komlos, Admnx., etc., v. Compagnie Nationale Air France. Judgment. United States Court of Appeals, Second Circuit. Filed Dec. 30, 1953. A. M. Bell, Clerk.

[fol. 238] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1953

(Petition Filed January 14, 1954. Decided February 26, 1954)

Docket No. 22751

EDITH KOMLOS, as Administratrix of the Goods, Chattels and Credits of Emery Komlos, Deceased, Plaintiff-Appellant,

v.

COMPAGNIE NATIONALE AIR FRANCE, Defendant-Appellee

Before Swan, Frank and Medina, Circuit Judges

On Petition for Rehearing

Foley and Statt (Frank J. Foley and Milton James, of counsel) for defendant-appellee.

Theodore E. Wolcott and Frederick W. Scholem, for plaintiff-appellant.

Per CURIAM:

The petition for rehearing is denied. In our original opinion we stated that the mother of the deceased is entitled to moral damages under Portuguese law. We made that statement on the basis of substantial data presented to us by the parties. However, we did not intend finally to decide that issue. Accordingly, further pertinent data may be presented at the trial in order that the trial court may be fully informed before arriving at a determination thereon.

[fol. 239] UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 26th day of February, one thousand nine hundred and fifty-four.

Present: Hon. Thomas W. Swan, Hon. Jerome N. Frank, Hon. Harold R. Medina, Circuit Judges.

EDITH KOMLOS, as Administratrix, etc., Plaintiff-Appellant,

v.

COMPAGNIE NATIONALE AIR FRANCE, Defendant-Appellee

A petition for a rehearing having been filed herein by counsel for the defendant-appellee,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

(S.) A. Daniel Fusaro, Clerk.

[fol. 240] [Endorsed:] United States Court of Appeals, Second Circuit. Edith Komlos, etc., v. Compagnie Nationale Air France. Order. United States Court of Appeals, Second Circuit. Filed Feb. 26, 1954. A. Daniel Fusaro, Clerk.

[fol. 241] Clerk's Certificate to foregoing transcript omitted in printing.

FILED
JUL 3 1954
HAROLD B. WILLEY, CL

Supreme Court of the United States

October Term, 1953

No. [redacted] 96

COMPAGNIE NATIONALE AIR FRANCE,

Petitioner-Defendant,

—against—

EDITH KOMLOS, as Administratix of the Goods, Chattels and Credits of EMERY KOMLOS, Deceased,

Plaintiff-Respondent.

RESPONDENT'S BRIEF

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